July 17, 2006

Filed Via Internet: https://secure.commentworks.com/ftc-bizopNPR/

Federal Trade Commission/Office of the Secretary
Room H-135 (Annex W)
600 Pennsylvania Avenue, NW
Washington, DC 20580

RE: Business Opportunity Rule, R511993

Dear Commissioners:

Herbalife International of America, Inc. ("HLF") appreciates the opportunity to submit comments to the Federal Trade Commission ("FTC") regarding its Notice of Proposed Rulemaking with respect to "The Business Opportunity Rule," R511993, published in the Federal Register on April 12, 2006 (the "Proposed Rule"). We also appreciate the extension of the public comment period published in the Federal Register on June 1, 2006.

Background on Herbalife International of America, Inc. (HLF)

For more than 25 years, Herbalife has offered direct selling business opportunities to individuals who wish to increase their income by selling nutritional supplements, weight management and personal care products. Herbalife is a publicly traded company listed on the New York Stock Exchange (SEC reports are available either under the Investor Relations tab of www.herbalife.com or at www.sec.gov for company trading symbol of HLF) with net sales of approximately $1.6 billion in 2005. HLF has over one million independent contractors ("Independent Distributors"), approximately 3,500 employees, and does business in 62 countries around the world.

Within the United States, HLF has approximately 250,000 Independent Distributors, each of whom is a small business owner, and each of whom would be adversely affected by the new requirements contained in the Proposed Rule.

Independent Distributors choose to sell Herbalife products for a variety of reasons. Some may choose to sell part time to earn income to help make ends meet, buy the extras or pay for their children's educational or other needs. Others may choose to work full-time because they like setting their own hours and working from home while building a business that is their own. An Independent Distributor who sells Herbalife products

earns profits by buying products at wholesale and reselling them at retail. If an Independent Distributor wants to increase his (or her) involvement in the business and the potential of attaining even higher levels of income, the Independent Distributor also may sponsor others into the business. The sponsoring Independent Distributor then earns commissions based upon their sales.

Many Distributors apply solely for the purpose of purchasing the product at wholesale prices and not for any business opportunity. However, because the Proposed Rule treats all the applications the same, for convenience sake we will refer to the applicants as signing up for a 'business opportunity,' although many of them are not in fact doing so, at least initially.

HLF is an active member of the Direct Selling Association ("DSA"), a non-profit national trade association of firms that manufacture and distribute goods and services sold directly to consumers by personal presentation and demonstration, primarily in the home. As a member of the DSA, HLF adheres to DSA's Code of Ethics as outlined in detail in comments submitted by the DSA. The DSA Code of Ethics is enforced by an independent Code Administrator.

Overview

We applaud the FTC's goal of addressing the potential for fraud in the sale of business opportunities. Consumers should be protected from fraudulent business opportunity ventures. As a publicly traded direct selling company with the highest standards, HLF works to distinguish our company and our independent sales force from those who may deceive innocent people.

We recognize the desire to protect consumers from "fly by night" scam companies. Unfortunately, no rule, no matter how stringent, will completely eradicate fraud. An overly-broad or poorly-drafted rule can, however, have the unintended consequence of making it more difficult and cumbersome for legitimate direct selling companies to recruit a sales force by creating conditions such that independent contractors are inhibited in their efforts to recruit new sales people. We are concerned that the Proposed Rule, as written, would have that effect.

The FTC should balance its approach to ensure that legitimate businesses and their independent sales forces comprised of thousands of small business owners can continue to thrive while protecting business opportunity purchasers from fraudulent opportunists. Our comments address the concerns we have with the Proposed Rule as written and offer alternatives that will help to achieve the FTC's goals, without unduly

burdening companies such as HLF and the thousands of small business owners who augment their incomes by becoming direct sellers.

Specific Comments and Recommendations

1. Distinguish Businesses: The FTC should distinguish – and exempt – businesses and their Independent Distributors from the effect of this proposed rule if they meet any of three tests: (A) the cost of the business opportunity is less than the present $500 exemption; (B) they have an established "buy-back" program such that companies refund in full the value of resalable product and support materials within seven (7) days of acquiring the business opportunity; or (C) they are publicly traded direct selling companies, meaning their detailed financial reports and legal disclosure information is readily available and frequently updated in accordance with stringent, existing federal reporting requirements.

   A. Keep the $500 Threshold and Continue to Exempt Voluntary Purchases of Bona Fide Inventory:

   The Proposed Rule would eliminate the current $500 investment threshold and the exemption for voluntary purchases of bona fide inventory. The FTC's proffered justification for eliminating the $500 investment threshold and inventory exemption is that the compliance burdens of the Proposed Rule are relatively modest when compared to the compliance burdens of the Franchise Rule. While we appreciate the FTC's acknowledgement that the compliance burdens of the Franchise Rule would be excessive for transactions under $500, HLF must point out that the compliance burdens imposed by the Proposed Rule are still very substantial. In the succeeding pages, HLF identifies the compliance burdens that we estimate we would incur and, even more detrimentally, the additional burdens that potentially will be borne by each of the tens of thousands of Independent Distributors of Herbalife products operating in the United States, all of whom are small business owners.

   HLF instead urges the FTC to keep the current $500 threshold and to index it to inflation, a practice that the agency has codified in other regulatory actions it has taken (such as in annually revising the Hart-Scott-Rodino Act reporting thresholds and related requirements). However, if the FTC is insistent on modifying or eliminating the current $500 threshold, HLF urges the FTC to grant a request from the DSA to maintain a minimum threshold of at least $200.00 for the purchase of a business opportunity, and to limit the application of the Proposed Rule to those opportunities that exceed this amount. This is not to suggest that the loss of $199.00 is insignificant. However, the substantial costs to legitimate direct selling companies and their distributors to comply with the requirements of the Proposed Rule far

exceed the minimal benefits to prospective purchasers who, as we have outlined below, have limited risk.

In our case, in order to distribute HLF products, the only payment that is required is for the purchase of a Mini International Business Pack ("IBP") that includes documents relating to the business opportunity, including forms and rules of conduct, as well as core product samples. The mini-IBP retails for $49.95 and the regular IBP retails for $79.95.

Our Independent Distributor contract requires no further purchases and is cancelable at the will of the Independent Distributor at any time, with or without reason. Upon cancellation, the Independent Distributor has the ability to sell for a profit any inventory he (or she) then possesses. Additionally, unlike any other business opportunity practices of which we are aware, members of the DSA, including HLF, offer the resigning Distributor the right, if he (or she) chooses, to return to HLF any resalable products purchased during the prior 12 months for a refund of 90 percent of his or her net cost. This is in accordance with the DSA's Code of Ethics. HLF goes further: if the cancellation occurs within 90 days of signing the Independent Distributor application, HLF also affords the resigning Distributor the right to return and receive a 90% refund on resalable components of the IBP

The Proposed Rule suggests even the nominal payment required for purchase of our IBP by a new Independent Distributor would trigger coverage of the Proposed Rule. We respectfully disagree. Not only is the initial required outlay very modest, but most people would consider the risk associated with this expenditure minimal, especially since any resalable materials and products may be timely returned to us for a refund of 90 percent of the cost paid.

By contrast, business opportunity frauds seek large up-front fees and will not have implemented bona fide repurchase guarantees. Their goal is to get as much cash as possible up front, at little cost to them. By maintaining the current $500 threshold, or even lowering the threshold to $200, and maintaining the current inventory exemption – especially for companies that offer a buyback of products – the FTC will alleviate the burdensome compliance requirements for the companies who clearly do not fall into the category of business opportunity frauds, while protecting individuals who have made a more substantial investment and who do not enjoy the inventory buyback offered by HLF and other DSA members pursuant to the DSA Code of Ethics. This is a more balanced approach to achieving the FTC's goals and would place a more reasonable compliance burden on companies such as Herbalife and the small business owners serving as Herbalife Independent Distributors.

B. Replace the Seven Day Waiting Period with a Seven Day Right of Rescission:

We agree that a business opportunity purchaser should have information made available to him (or her) on a timely basis to allow him (or her) the opportunity to assess the risk involved and to make a conscious, thoughtful decision in a timely manner.

Unfortunately, Proposed Section 437.2 overshoots this mark by requiring written documents to be provided to a prospective purchaser at least seven calendar days before the prospective purchaser signs any contract or makes a payment or other consideration to the seller, directly or indirectly through a third party. Mandating a seven day waiting period to allow a prospect to review the newly required disclosure statement imposes costs and burdens on the company, Distributors who recruit and persons wishing to become Distributors that far exceed the benefits to the business opportunity buyer. HLF outlines below the problems it anticipates with a mandatory seven day waiting period and offers an alternative that not only provides greater protection to the business opportunity buyer, but reduces these burdens and costs.

First, a mandatory seven day waiting period prevents a prospective business opportunity purchaser from making a decision in his (or her) own timeframe. Regardless of whether he (or she) is approached about the business opportunity or seeks it out on their own, he (or she) must wait for whatever period of time it takes to receive the written disclosure document (see comments below), and then he (or she) must wait a further seven days before signing the document even if he or she is in a position to review all the material and conduct whatever additional due diligence he (or she) deems necessary in a shorter time frame.

Second, a governmentally-imposed requirement that an individual wait seven days before entering into a contract unfairly tends to color one's thinking about the potential legitimacy of the contract. It suggests that one should be inordinately suspicious about the business opportunity.

Third, a seven day waiting period is an unnecessary delay for a person who is eager to get started. Individuals who choose to become direct sellers are attracted by the relative ease of doing so. Currently, a potential Distributor is provided with a Herbalife Distributor Application for review. He (or she) is informed of the policies and procedures and has an opportunity to review same, which include the refund and cancellation provisions, at the time they are provided the application. Once the Application is signed, the recruiting Distributor forwards it to the Company.

Independent Distributors may sign up on the spot and are comfortable doing so because there is a virtually no money at "risk" and all relevant information is readily at hand.

Remember, under current HLF policy, if an Independent Distributor chose to continue as a Distributor beyond the seven day period, he (or she) would still have limited money at risk because when he (or she) no longer wished to be a Distributor we would refund him (or her) 90 cents on the dollar for all resalable products or materials purchased within the previous year.

Finally, it is difficult to comprehend how the FTC in any sense could equate business opportunities costing $500.00 or less with a franchise that could cost hundreds of thousands of dollars or more. Yet, that is what the FTC is doing. It is unreasonable and uneconomic for the FTC to contemplate imposing in effect the same type of financial and legal advice and consultation upon business opportunities requiring an investment of $500 or less with those necessitated by the consideration of a franchise purchase likely to require an investment easily 20 times or more of the $500 outlay.

Alternative Proposal

We suggest a purchaser of a business opportunity has more to gain from having seven days after purchase of the business opportunity to further study and review the opportunity at length and even to commence the business activities involved and then cancel to receive a refund as compared to having seven days to in advance of purchase of the business opportunity to review a disclosure document. We urge the FTC to provide an exemption from the rule (or from the seven day waiting period) where the business opportunity buyer is offered the right to cancel the transaction and obtain a refund for resalable materials or product.

Under this proposal, an individual who signs a distributor application would have seven days to cancel his (or her) distributorship and receive a refund of 100 percent of the net cost of resalable materials and product he (or she) had purchased. A seven day right of rescission would be of far greater value to the prospective purchaser and would serve as much better protection against fraud than the requirements of the Proposed Rule.

A seven day right of rescission also should have the additional benefit of eliminating the problematic proposal to require the disclosure of the names, addresses and telephone numbers of the ten closest Distributors. The marginal benefits one may

receive from being given ten other references is greatly outweighed by the burden of compliance and privacy concerns.

C. Exempt Publicly Traded Direct Selling Companies:

Any company, whether a mandatory or voluntary filer, current in its filing obligations under the Securities Exchange Act of 1934, as amended, should be exempt from the Proposed Rule. HLF, as a publicly traded company, already provides significant legal and financial information which is available for public access on the SEC's EDGAR website as well as through the companies own websites. Furthermore, prospective business opportunity purchasers are able to locate publicly traded companies easily. Without belaboring the point, the extensive compliance requirements that all publicly traded companies must satisfy in accordance with Federal and market strictures should suffice to constitute a more than reasonable assurance for the FTC that the company is a bona-fide business not out to perpetrate business opportunity frauds. In addition, by virtue of all the associated requirements, the FTC will have extensive assurance that the company can be readily located and possesses sufficient assets to provide redress for any victimized business opportunity purchasers in the unlikely event that such a company would risk the wrath of the Securities Exchange Commission, State Attorneys General, and the plaintiffs' bar for the sake of embarking upon such a scheme. Accordingly, there is no good reason to insist upon unnecessarily imposing extensive compliance costs in order to achieve at most *de minimis* benefits by covering such companies under the Proposed Rule

2. Content of the Disclosure Document – Section 437.3

We appreciate the FTC's interest in ensuring that prospective business opportunity purchasers have the necessary information to make an informed decision about the business opportunity. We also appreciate the FTC's efforts to minimize compliance burdens relative to franchise sales rules. However, given the disclosure topics, we think it is unrealistic to expect most business opportunity sellers to be able to confine their disclosures to a single page. It is far more likely that the single page disclosure document referred to as Appendix A in the Proposed Rule will yield numerous pages once completed.

Legal Actions

Although there is a litigation explosion in this country from which no company is immune, an individual who is considering a business opportunity that involves a nominal purchase with a right to cancel and obtain a refund may not understand why

a reputable company might be engaged in so much litigation. Section 437.3 (3) would require the disclosure of any civil or criminal action for misrepresentation, fraud, securities law violations or unfair or deceptive practices within 10 years immediately preceding the date that the business opportunity is offered. The legal actions that are required to be disclosed would include those involving the seller, any affiliate or prior business of the seller, any of the seller's officers, directors, sales managers, or any individual who occupies a position or performs a function similar to an officer, director, or sales manager or any of the seller's employees who are involved in business opportunity sales activities. Even frivolous actions would have to be disclosed, as well as those actions in which the company ultimately prevails.

However, individuals reviewing the list of legal actions are unlikely to learn the merits or the outcome of any of the actions. Accordingly, disclosure of these legal actions may unnecessarily inhibit interest in the company and lead to a significant loss of potential Distributors which ultimately could impede growth of the company's sales force.

In the preamble to the Proposed Rule, the FTC comments that "[t]he Commission believes that these types of actions are the most relevant in addressing business opportunity fraud." 71 Fed. Reg. at 19069. If the objective is to ensure a prospective business opportunity purchaser is made aware of litigation arising only in the United States brought against the company by another business opportunity purchaser, we believe the Proposed Rule is far too broad and requires disclosure of information that can not possibly be of value to an individual with a limited amount of money at "risk." While the SEC-required filings for material litigation matters (readily available to prospective purchasers via the SEC's EDGAR website and the company's own website) should be sufficient to advise any prospective business opportunity purchaser of outstanding litigation of importance, if the FTC insists upon such disclosures, we strongly urge the FTC to clarify that the Proposed Rule is to only cover legal actions arising in the United States and to narrow the scope of the legal actions that must be disclosed.

There is a substantial cost to a company to compile and maintain such a list of legal actions to ensure that any and all litigation that falls within the purview of the Proposed Rule's requirements is included and any and all litigation that falls outside the Proposed Rule's requirements is excluded. As litigation advances and claims are amended to include one of the claims within the reach of the Proposed Rule, the litigation will have to be included in the list. All litigation will have to be reviewed on a quarterly basis to ensure that the list is current. Such compilations require not only data entry and distribution services, but legal review. This is a significant burden for a firm of our size that operates in 62 countries.

Finally, we question the burden this requirement places upon the recruiting Independent Distributor who provides the disclosure document to the potential business opportunity purchaser. How does the recruiting Independent Distributor respond to any questions about the litigation? He (or she) in most if not all instances will have no more knowledge than what is listed on the disclosure statement. This information in and of itself is meaningless without context and has the potential to deter a prospective purchaser unnecessarily.

While it may appear overly simplistic, a prospective purchaser would probably gain more practical information by calling the Better Business Bureau office located nearest to the seller's headquarters.

For the above reasons, we urge the FTC at a minimum to exempt from such provisions direct selling companies that are publicly traded who already are disclosing their material legal actions within the context of publicly available SEC filings.

Cancellation or Refund Requests

While we agree any cancellation or refund policy should be disclosed in writing, we question the requirement in proposed Section 437.3(a)(5) for the seller to state the number of purchasers of the business opportunity during the two years prior to the date of the disclosure, and the number of cancellation and refund requests submitted by prior purchasers during the same period. The assumption appears to be that cancellation and refund requests are linked to the seller's post-sale performance. While this arguably could be the case with respect to certain purchasers in certain businesses, this is not true in the direct selling industry. Individuals chose to enter and exit the direct selling business for any number of reasons and often plan to participate for only a short period of time – perhaps to earn enough to take a vacation or to purchase a new automobile. Many people will stop selling for a while and start again months later without ever canceling.

Calculating the number of people who entered and exited in a two year period imposes a burden on the company that does not appear to offer any corresponding value to a prospective purchaser. Without knowing why someone left, the information is meaningless to the potential Distributor and potentially harmful to our ability to recruit new Distributors. Also, there is an additional burden on the company of updating this information quarterly and retaining each version for three years as required by Section 437.6 (a) and for maintaining records of each oral or written request for cancellation or refund for a period of three years as required in Section 437.6(d). Also, how does FTC propose that firms handle information pertaining to

individuals who temporarily exit the business (such as those who engage in direct selling to pay for a specific household expense) but who later rejoin? HLF recommends at a minimum that the Proposed Rule only require disclosure of written requests for cancellation/refund.

The FTC correctly questions in Section K whether such a disclosure requirement would discourage sellers from offering cancellations or refunds. Indeed, the net effect of such a requirement may well be to reduce or severely restrict the ability to obtain such cancellations or refunds, thereby ironically harming many of the individuals the agency is attempting to protect. DSA members are unique in offering a buy back refund right – no industry or channel of distribution offers such broad consumer protection. The same is true of the right to cancel at any time, no questions asked. The disclosure requirement contained in the Proposed Rule would penalize the direct selling industry for taking the initiative of offering the buy back refund right and the right to cancel. Those in the direct selling industry are more likely than those in other businesses to have to provide this information and to calculate the cancellation and refund requests. If a prospective business opportunity purchaser is looking at a variety of options, including those other than direct selling, direct selling may look less appealing because of the higher numbers attributed to refunds and cancellation. The Proposed Rule is likely to have unintended consequences adversely impacting those the agency is trying to protect. What should be a positive for the direct selling industry could be viewed as a negative due to the requirement to calculate the number of cancellation and refund requests that have been voluntarily provided.

References

We understand the FTC's objective in requiring companies to disclose the names of previous purchasers of the business opportunity to prospective buyers is to enable prospective buyers to verify any claims and to conduct due diligence of the offering prior to signing a contract with the company. However, the Proposed Rule's requirement to provide a list of the ten purchasers (including name, city, state and zip code, as well as telephone number) who are closest in geographical proximity to a prospective purchaser or, alternatively, to provide a list of all purchasers (including name, city, state and zip code and telephone number) within the last three years is overly burdensome and costly to our Independent Distributors and our company, has limited value to a prospective purchaser, and raises a host of privacy concerns.

Why is the FTC proposing to require the direct selling industry to provide such detailed lists of references to prospective recruits? Even the franchise industry—where the dollar amounts at risk by purchasers is many times over what is at stake

here at the current $500 cut-off, much less at any lower threshold the FTC ultimately might set – is not required to provide such detailed references to prospective franchise buyers. Already, publicly traded companies routinely make available details of their finances, legal actions, business plans and other data that one can access readily and for free if they have an interest.

If the Independent Distributor is required to provide a list of ten purchasers who are closest in geographical proximity to a prospective Distributor, the Distributor will have to contact HLF and provide the name and address of the potential Distributor. HLF will need to compile the list of references and provide it to the Independent Distributor who in turn will provide it to the prospective Distributor, along with the other information required in the disclosure document. The delay required for the preparation and dissemination of the list will result in a loss of recruits who, under our alternative proposal, could have cancelled within seven days of signing a Distributor Application and obtained a full refund.

Other unintended consequences may occur. Perhaps the referenced Distributor discontinued selling products for Herbalife two months ago and now sells products for a competitor. He (or she) has a perfect opportunity to recruit for another company when the prospective Herbalife Distributor calls for a reference. What is to prevent a company's competitor from inquiring about a business opportunity knowing that he (or she) will receive a list of ten references or the entire list of HLF Distributors? Once he (or she) receives that information he (or she) has a marketing tool of his (or her) own to recruit existing Distributors away from HLF to his (or her) own business.

We maintain that our Distributor contact list is confidential, proprietary information that must not be disseminated publicly. Our sales force has entrusted us with their addresses and private telephone numbers based upon this understanding. The Proposed Rule, as written, will require us to notify all of our Distributors that their personal contact information may be made available for potential Distributors to utilize – in reality as they desire – whether the phone call is a legitimate request for additional information on HLF, or a solicitation to enter another business, or for any other reason. We cannot project the number of Distributors who may decide to stop selling our products because for whatever reason they do not wish to have their names and contact information provided to the general public. We also find it highly troubling that the FTC, which in other contexts (such as the Do Not Call Rule and data breaches involving personally identifiable information) is so careful to promote privacy protections, would abrogate such principles in this setting without compelling justifications.

In the commentary to the Proposed Rule, a distinction was drawn between "franchisees identified by a common trademark or trade name that can be identified by looking in the yellow pages or other business directories" and "business opportunity purchasers [who] are not readily identifiable." 71 Fed. Reg. at 19071. We suggest at least that business opportunities having federally registered trade marks or trade names, or whose business opportunity operators have listings in yellow or white pages or other business directories, should not be required to provide references.

HLF further suggests that the Proposed Rule be amended to exempt publicly traded companies from and the requirement of the prior delivery of the disclosure statement, because anyone interested in becoming an HLF Distributor can find extensive information about HLF on the SEC's Edgar website.

Receipt

This section of the Proposed Rule is not entirely clear. Proposed Section 437.3(a)(7) would require the disclosure document to be in a form that would allow the prospective purchaser to sign and return one copy to the recruiting Distributor and keep the original. While there appears to be no explicit provision requiring the recruiting Distributor to forward the receipt to the company, per Section 436.6, the company would be required to retain the disclosure receipt for a period of three years. Therefore, the Independent Distributor would be responsible for forwarding the receipt to the company.

This imposes an additional burden upon our Distributors and adds to our burden of informing and educating the existing sales force about these new requirements, should they be adopted. Under the Proposed Rule it is unclear whether the Independent Distributor would be required to keep a copy of what literally would quickly aggregate to tens of thousands of documents.

3. Paperwork Requirements

The FTC vastly underestimated the impact this Proposed Rule will have on the small business men and women throughout the country who will now be required to comply with additional paperwork requirements. The delay for our Independent Distributors (due to the proposed mandatory seven day waiting period) and the extra steps required – combined with the additional paperwork – have the potential to make recruiting additional Distributors far less appealing. It is not unusual for individuals to become Herbalife Distributors on a part-time basis with the goal of selling products and recruiting others because it is easy to do so. As such, many

individual direct sellers do not have offices and filing cabinets to maintain records, do not have email accounts for their businesses and do not want to spend their time as an intermediary between a potential Distributor and corporate headquarters. They want to sell products and recruit new Distributors with a minimal amount of paperwork.

Many of the hard-working individuals who are putting their talents as entrepreneurs to work as HLF Independent Distributors lack the capital to establish a formal business office. Often, they operate their Herbalife distributorships without computers or sophisticated processes. For them, the rigorous paperwork compliance provisions of the Proposed Rule will be onerous. Again, and ironically, in order to ostensibly drive the already microscopically small risk for purchasers investing $500 or less to virtually zero, the Proposed Rule could well force such purchasers to substantially increase their required outlay (and associated risk) by effectively mandating they make capital expenditures to comply with these paperwork provisions.

Direct selling offers opportunities for people at all educational and economic levels because start-up costs and the resources required to run the business are minimal. The Proposed Rule will increase Distributors' out-of-pocket costs and may erode their profit margin significantly, perhaps to the point where there is no longer an economic gain for the individual. For example, is it worth it to a Distributor who earns $2,000 a year in commissions to buy a computer and obtain internet access to facilitate communication with HLF and potential recruits? Many Distributors run their businesses successfully with limited out-of-pocket costs. The Proposed Rule will arbitrarily increase the cost to our Independent Distributors of running a business.

The Proposed Rule fails to take into account the time and money required of companies to explain this new process to their existing sales force and to train them how to comply with the Proposed Rule. Our Independent Distributors will need to learn about the new requirements and implement the means to track the disclosures required to ensure that both the company and recruits have the information. At a minimum, this means the acquisition of email accounts or an increase in long distance calls to track the information flowing from the company to the Distributor to the potential Distributor. It is inevitable that some Distributors (particularly those who do not spend significant time recruiting) will sign up a new Distributor only to be told that he (or she) did not comply with the new requirements and the process will have to be repeated again. An argument could be made that the Home Office will be obligated to make a good faith effort to ensure no one is permitted to sign a Distributor Application without having received the proper disclosures in the time proscribed under the Proposed Rule and the Distributor may cause the process to

start over with someone who believed he (or she) was already enrolled as a Distributor.

HLF's current procedure for Distributors to sign up a new Distributor is designed to accommodate the realities of the independent contractor businesses. A Distributor provides the HLF Distributor Application to a prospect he or she may meet by happenstance or otherwise. The Application Form contains the name and contact information of the individual Distributor and is ready to be provided to anyone who is interested. The potential Distributor completes the Distributor Application (perhaps during the initial meeting) and returns it to the Distributor along with payment for the IBP. The Distributor forwards the Distributor Application to HLF. The new Distributor's application form is processed and the new Distributor is able to purchase whatever products he (or she) would like to purchase at wholesale prices. It is a simple process for all parties and it works well.

The individualized requirements of the proposed Disclosure Statement, combined with the mandatory seven day waiting period, will turn a simple process into one that will be cumbersome and costly for independent contractors to maintain. Under this proposed process, no one will be permitted to sign up as a Distributor at an initial meeting. The Distributor will have to have a minimum of three contacts with the potential Distributor.

At the initial meeting, the Distributor will obtain contact information of the potential recruit. Then the Distributor must forward the names and contact information of potential Distributors to HLF which would then compile an individualized disclosure form for the potential recruit with a list of ten references in closest geographical proximity.

In addition to the references, HLF will need to attach to each disclosure statement for each potential Distributor an "Earnings Claims Statement," should the company chose to make an earnings claim, a wide variety of legal actions, and its cancellation or refund policy with a calculation of the cancellation or refund requests over the past two years. The total number of purchasers of the business opportunity during the previous eight quarters immediately preceding the date of the disclosure document and the total number of oral and written cancellation requests during that period must be calculated and contained in the disclosure document. This necessitates the retention of information on all individuals who entered the business and who exited the business. All of this information must be updated quarterly and copies of each materially different version must be maintained for a period of three years as required in Sections 437.3(b) and 437.6(a).

The Distributor must provide the statement to the prospective Distributor, noting the date of delivery in order to verify the seven day waiting period. This necessitates a second contact with the potential Distributor. After the seven day waiting period ends, the Distributor must contact the prospective Distributor for the third time to obtain the signed duplicate copy of the disclosure statement which the Distributor must then forward to headquarters. The company must keep this form on file for three years. New Distributors will need to be entered into the company data base to ensure accurate accounting for future disclosures.

This proposed process significantly increases the amount of time required of each Distributor to recruit one person. Each sponsoring Distributor would have to request HLF to provide individualized Disclosure Statements for each of applicant. Indeed, since not every person who is presented the opportunity wishes to become an applicant, the number of disclosure statements that would have to be prepared to give to these prospect prospects would be many times that number. By the time all the required information is disclosed, the proposed one-page Disclosure Statement would contain many, many pages of information which the Distributor must provide to the potential Distributor.

The FTC estimates it will take just one to three hours to prepare the initial disclosure document and one to two hours per year to maintain necessary records and that the annual disclosure burden will diminish after the first year to one to two hours to prepare disclosures and one to two hours to retain records. As suggested above, the FTC has vastly underestimated the time required for HLF and our Independent Distributors to prepare the disclosure documents and to retain the necessary records. Furthermore, we believe the costs to achieve compliance far exceed the benefits to consumers, especially from publicly trade companies striving to be good corporate citizens.

In light of the comments provided in this submission (which in the interest of brevity only begin to suggest the extent of the problems associated with the Proposed Rule), Herbalife respectfully requests that the FTC hold public workshops for the purpose of receiving testimony from independent small business people for whom this proposed rule will impose an enormous paperwork compliance burden. Herbalife also respectfully requests that it be provided with an option to participate in the event the FTC decides to conduct workshops or embark upon any other further process regarding the Proposed Rule.

Summary

We suggest that the Proposed Rule, to the extent it includes legitimate direct selling companies, should maintain a reasonable threshold; exempt voluntary purchases of bona fide inventory (particularly when subject to a reasonable buy back right, such as that provided by DSA members); exempt companies whose securities are publicly traded and for which financial information is readily available. In the alternative, we suggest that an exemption be provided for companies offering a rescission period.

We welcome the opportunity to discuss our comments with the FTC and to respond to any additional questions you may have regarding the applicability of the Proposed Rule to our business.

Sincerely,

Brett R. Chapman
General Counsel